Supreme Court, U.S.
FILED
SEP 12 2005
OFFICE OF THE CLERK

Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER
v.
FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER
v.
FOUAD N. DAGHER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission (FTC) have primary responsibility for enforcing the federal antitrust laws. The FTC reviewed the transaction that created the joint ventures at issue in this case. See *In re Shell Oil Co.*, 125 F.T.C. 769 (1998); FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). More generally, the agencies share a strong interest in the proper application of the per se rule in civil and, in the case of the Department of Justice, criminal enforcement proceedings.

STATEMENT

Petitioners Shell Oil Co. (Shell) and Texaco, Inc. (Texaco) formed two joint ventures to combine the refining and marketing of their gasoline products within the United States. Respondents, a class of 23,000 gas station owners, brought a suit alleging that petitioners violated the antitrust laws by agreeing that each joint venture would unify its pricing of the Shell and Texaco brands of gasoline sold by the venture. Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court rejected that theory of liability and granted summary judgment in favor of petitioners, but the court of appeals, in a divided decision, reversed. See Pet. App. 1a-33a, 46a-69a.[1]

1. Petitioners were once "fierce competitors" in all aspects of the oil and gasoline markets. Pet. App. 3a. In 1998, however, they formed a "nationwide alliance" through two wholly owned joint ventures that encompassed their "downstream" operations (i.e., those operations relating to the refining, distribution, and sale of gasoline) in the United States. *Id.* at 3a-4a. Petitioners formed Equilon Enterprises to refine, transport, and market Shell and Texaco gasoline products in the western United States. *Id.* at 4a. Together with a third joint-venture partner, they formed Motiva Enterprises to assume the same responsibilities in the eastern United States. *Ibid.*[2] Petitioners transferred all of their

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[1] "Pet. App." refers to the petition appendix in No. 04-805.

[2] The district court granted summary judgment to the third joint-venture partner because none of the named respondents had ever purchased gasoline from Motiva. Pet. App. 40a. The court of appeals affirmed on that point. *Id.* at 10a-12a. Accordingly, the balance of this

domestic downstream assets to those joint ventures and ceased competing in the downstream U.S. markets. *Id.* at 5a, 37a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, those operations involving the exploration and production of crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand." *Id.* at 5a; see *id.* at 58a.[3]

Under the terms of the consummated alliance, petitioners granted Equilon an exclusive license to sell gasoline under their brand names in Equilon's geographic region. Although the Texaco and Shell brands maintained their "own unique chemical composition (the gasoline is differentiated by separate packages of 'additives'), trademark, and marketing strategy," Pet. App. 6a-7a, both brands were sold exclusively by Equilon. At

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brief primarily addresses Equilon, although the same analysis would apply equally to its sister venture, Motiva.

[3] Shell has since bought out Texaco's interest in Equilon and Motiva, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) <http://www.ftc.gov/os/2002/01/chevronorder.pdf>. The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,143 (2001).

some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. *Id.* at 6a.

Petitioners provided as part of their alliance that Equilon's profits (or losses), as well as Motiva's, would be divided between petitioners in a fixed ratio based on the assets each contributed to the ventures. Pet. App. 5a. Thus, each petitioner's returns were determined by the ventures' total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. Each joint venture was terminable by mutual consent at any time, or unilaterally after five years (subject to specified notice provisions). *Ibid.*

The FTC and four western state attorneys general investigated the transactions. Pet. App. 5a. The FTC issued a complaint alleging that the combinations, as originally proposed, would violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition." 15 U.S.C. 18. See *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent undue concentration in certain downstream markets, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

2. The district court granted petitioners summary judgment, holding in relevant part that respondents had "failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason

analysis" and instead asserted liability only "under the per se or quick look doctrines." *Ibid.*; see *id.* at 7a, 47a. The district court accordingly found no need to engage in a rule of reason inquiry in resolving the issues before it. See *id.* at 68a.

The district court rejected respondents' contentions that an agreement between petitioners to unify Equilon's pricing for Shell-branded and Texaco-branded gasoline in each local area would constitute per se unlawful horizontal price fixing in violation of Section 1 of the Sherman Act. Pet. App. 52a-54a. The court observed that "every * * * joint venture must, at some point, set prices for the products they sell." *Id.* at 53a. Respondents' theory, the court explained, would essentially "act as a per se rule against joint ventures between companies that produce competing products." *Id.* at 54a.

3. A divided panel of the court of appeals reversed the district court's grant of summary judgment. Pet. App. 1a-33a. The panel remanded the case for further proceedings to determine whether petitioners had committed a per se violation of the Sherman Act by agreeing to unify the prices for the two gasoline brands sold by the joint ventures. *Id.* at 21a-23a, 27a-28a.

The court of appeals viewed the case as presenting the question whether the courts should "find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." Pet. App. 12a-13a.[4] The court did not take

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[4] The court assumed that petitioners reached an agreement to unify prices at the formation of their alliance. See Pet. App. 13a ("the

issue with the district court's conclusion that Equilon and Motiva were "legitimate" efficiency-enhancing joint ventures. *Id.* at 4a-5a, 9a, 16a. Invoking the ancillary restraints doctrine, however, the court concluded that the agreement to unify prices was a "naked" restraint, *id.* at 16a-17a, in the absence of a showing that it was "reasonably necessary to further the legitimate aims of the joint venture," *id.* at 21a.

The court of appeals was not persuaded by petitioners' justifications for the agreement. First, the court rejected petitioners' argument that application of the per se rule would interfere with the ability of joint ventures to set prices for their products. Pet. App. 26a-27a. In the court's view, the "question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands." *Ibid.* The per se rule applies, the court stated, "when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and

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companies fixed the prices * * * by agreeing *ex ante* to charge the exact same price for each"); *id.* at 19a (noting evidence "that the decision to unify the pricing of the Texaco and Shell brands was made contemporaneously with the formation of the alliance, but before the actual joint ventures officially existed"); *id.* at 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). See also *id.* at 6a (the "decision to charge the same price for the two distinct brands 'was developed as sort of an operating requirement right from the very start or near to the very start of the alliance'"); *id.* at 22a (petitioners "*unified* the pricing of the two brands from the time the alliance was formed"). Neither the panel majority nor respondents have suggested that the agreement to unify prices—regardless of its timing—affected the prices of any product sold by Texaco or Shell.

furthering the legitimate aims of the joint venture—a relationship that justifies the otherwise prohibited price restraints." *Id.* at 27a. "Thus far," the court concluded, petitioners had failed to produce evidence "demonstrating that their price fixing scheme was ancillary rather than naked." *Ibid.* Second, the court rejected respondents' claim that the challenged agreement was intended to avoid potential suits for price discrimination under the Robinson-Patman Act, 15 U.S.C. 13, on the ground that the Robinson-Patman proscriptions were "unquestionably * * * inapplicable." *Id.* at 25a.

Judge Fernandez dissented in relevant part. Pet. App. 28a-33a. He observed that Equilon, rather than petitioners, competed in the business of refining, transporting, and marketing gasoline in the western United States. Equilon "ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands." *Id.* at 29a. In his view, "nothing more radical is afoot than the fact that an entity * * * prices its own products." *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

A. The court of appeals fundamentally erred in holding that petitioners may have committed a per se violation of Section 1 of the Sherman Act by agreeing to unify the prices for the two brands of gasoline produced and sold by their lawful joint ventures. Per se condemnation is reserved for conduct that is "manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). Per se conduct involves predictably pernicious restraints on competition that have virtually no potential benefit to consumers,

such as agreements *among competitors* to fix prices, allocate markets, or limit output. The pricing agreement at issue here does not qualify because that agreement, as distinct from the decision to create the joint venture, did not eliminate any competition between petitioners in the sale of their respective brands.

Petitioners' formation of Equilon—a legitimate joint venture—effectively merged their downstream operations, giving that entity control over the sale of both Texaco-branded and Shell-branded gasoline and terminating petitioners' prior competition with respect to the refining and sale of gasoline in the western United States. Petitioners' challenged agreement, as co-owners of Equilon, that Equilon would set a unitary price for the distinct brands of gasoline did not alter the fact that petitioners were no longer competitors. Petitioners could have agreed to market a single brand of Equilon gasoline at a fixed price, and their decision to maintain two brands at the same price does not remotely merit per se condemnation. Section 1 does not address competition between brands under the exclusive control of a unitary company. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

B. The court of appeals also improperly invoked the ancillary restraints doctrine to cabin the effect of its erroneous application of per se principles. The court asserted that petitioners were required to demonstrate that the challenged agreement was reasonably necessary to achieve the purposes of the joint venture in order to avoid per se condemnation. The ancillary restraints doctrine, however, allows an agreement that would otherwise be viewed as per se invalid to be evaluated in light of the procompetitive effects of an

efficiency-enhancing integration of economic activity to which it is reasonably related.

The ancillary restraints doctrine has been applied to restrictions on joint venture partners' conduct outside the venture, and to rules affecting venture membership, which may be viewed as concerted refusals to deal. But the doctrine does not apply to an agreement that does not itself eliminate any competition. In particular, it has no proper role when a challenged restraint affects only a legitimate joint venture's *own* conduct as a competitor in the market, especially when the joint venture partners do not separately participate in that market. Contrary to the court of appeals' premise, the owners of a legitimate joint venture are not required to assume the burden of demonstrating that each decision about the joint venture's conduct is reasonably necessary to achieve the venture's purposes, and their failure to do so does not convert each such decision into a restraint of trade subject to the per se rule.

C. Extending per se condemnation to agreements that do not "always or almost always tend to restrict competition and decrease output," *BMI* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979), would deter lawful conduct and constrain efficiency-enhancing commercial undertakings. In this case, subjecting a legitimate joint venture to per se condemnation for setting a pricing policy for the venture's own products would needlessly interfere with the venture's pricing decisions and pointlessly impair efficient competition to the detriment of consumers. Moreover, the court of appeals' expansion of the per se rule potentially undercuts that rule's value in facilitating effective enforcement of the antitrust laws. The Department of Justice's criminal enforcement program depends on a sharp demarcation between conduct

evaluated under the rule of reason and conduct that is unlawful per se. Subjecting agreements among joint venture participants that likely are not anticompetitive to per se condemnation would blur that demarcation and undermine the rationale for the per se rule.

ARGUMENT

AN AGREEMENT BETWEEN THE OWNERS OF A LEGITIMATE JOINT VENTURE RESPECTING THE PRICING OF THE JOINT VENTURE'S PRODUCTS IS NOT SUBJECT TO PER SE CONDEMNATION

The court of appeals mistakenly condemned as per se invalid an agreement between owners of a lawful joint venture respecting the pricing of the joint venture's own products, ruling that the agreement is unlawful per se unless the owners can justify it as an ancillary restraint that reasonably furthers the legitimate aims of the venture. The court's decision reflects a fundamentally flawed understanding of the proper role of per se analysis and the ancillary restraints doctrine. That decision, which threatens to chill efficiency-enhancing ventures that promote vigorous competition and benefit consumers, should be reversed.

A. The Court Of Appeals Improperly Extended Per Se Analysis To An Agreement That Does Not Restrain Competition

1. This Court has properly construed the Sherman Act to confine the role of per se rules in identifying anticompetitive activity. The rule of reason is the "prevailing standard of analysis" under the Sherman Act, and any departure from that standard "must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Continental T.V., Inc.* v.

GTE Sylvania Inc., 433 U.S. 36, 49, 59 (1977). See *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard"). Departures from rule of reason analysis are limited to those "restraints * * * hav[ing] such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)).

Accordingly, per se rules—which obviate proof that the challenged conduct in a particular case unreasonably restrains competition—are "appropriate only when they relate to conduct that is manifestly anticompetitive," *GTE Sylvania*, 433 U.S. at 50, such as a horizontal agreement among competitors to fix prices or restrict output. See, *e.g.*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986) (expressing reluctance to adopt per se rules with regard to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious").[5] Per se condemnation is inappropriate in the absence of a determination that the defendant's behavior and the "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA* v. *Board of Regents*, 468 U.S. 85, 103-104 (1984).[6]

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[5] See also *BMI* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (per se treatment appropriate when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

[6] Texaco argues that Section 1 of the Sherman Act does not apply at all to the conduct alleged in this case because respondents in fact challenge the pricing decisions of the joint venture, not a pricing

2. The court of appeals erred in concluding that petitioners' agreement to unify the pricing of Equilon's Texaco-branded and Shell-branded gasoline could be unlawful per se under Section 1 of the Sherman Act. An agreement by the participants in a lawful joint venture to determine the price of the joint venture's products is not "price-fixing" within the meaning of the antitrust laws. There is no suggestion here that the joint venture is a sham to mask cartel conduct; rather, the courts below recognized that the venture is an efficiency-enhancing integration of the participants' businesses. It would make no difference whether petitioners agreed to unify the pricing of products after the joint venture became operational. The joint venture participants are entitled to set the price for the joint venture products whether marketed under the joint venture's own single brand or under the preexisting brands of the joint venture owners because the lawful formation of the joint venture eliminated competition between the joint venture participants' downstream operations.

a. The court of appeals erred at the outset by characterizing the alleged agreement between petitioners to unify the pricing of the joint ventures' products as

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agreement between petitioners. Texaco Pet. 10-13, 18-22; Texaco Supp. Br. 3-4. This Court, however, need not reach that argument. Texaco acknowledges that "the decision of two companies to form a joint venture itself is a 'merging of resources' to which Section 1 applies." Texaco Pet. 18 (quoting *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984)). The court of appeals, in reviewing the district court's grant of summary judgment to petitioners, based its decision on the disputed factual premise that petitioners reached an agreement to unify pricing at or before the joint venture's formation. See Pet. App. 19a & n.11; see also note 4, *supra*. For the reasons explained below, even assuming that factual premise is correct, the court was mistaken in concluding that the agreement is subject to per se condemnation.

"price-fixing." Pet. App. 16a. See *id.* at 26a-27a ("The question is whether two former * * * competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands."). The court's characterization inaccurately portrays the substance of the agreement at issue by substituting an inapt label in place of an analysis of the agreement's significance and effect. See *BMI* v. *CBS, Inc.*, 441 U.S. 1, 8 (1979) ("easy labels do not always supply ready answers").[7]

Petitioners' agreement was not "price fixing" as that term is "generally used in the antitrust field," *BMI*, 441 U.S. at 9, because it did not eliminate any competition that would otherwise have existed between competitors. Equilon's *formation* eliminated all price and non-price competition between petitioners with respect to the refining and sale of gasoline in the western United States. As the court of appeals and respondents have recognized, after Equilon became operational, Shell and Texaco ceased their separate participation in the relevant domestic downstream markets. See Pet. App. 5a; Br. in Opp. 5.[8]

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[7] In *BMI*, this Court rejected the argument that participants in a legitimate joint venture engage in price fixing subject to the per se rule when they set the price at which the venture sells its products to third parties. The Court noted that such a practice cannot be categorically described as "'plainly anticompetitive' and very likely without 'redeeming virtue.'" 441 U.S. at 9. As the Court observed, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Ibid.* See *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (blanket license in *BMI* "was not a species of the price-fixing agreements categorically forbidden by the Sherman Act").

[8] Respondents observe that petitioners' alliance could be unwound at some point. See Br. in Opp. 10. But that observation does not alter

The court of appeals expressed general concern that Equilon could sell gasoline under the distinct Shell and Texaco brands at the same price. Pet. App. 12a-13a. But this Court has made clear that Section 1 of the Sherman Act is not concerned with competition between brands under the exclusive control of a unitary company. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (rejecting intra-enterprise conspiracy doctrine). As a consequence of their joint venture, petitioners no longer competed in the domestic retail sale of gasoline—*regardless* of how they (or Equilon itself) chose to price the distinctly branded products sold by Equilon. A remedial order compelling Equilon to price the brands independently would not

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the analysis in this case. The district court recognized that, in light of petitioners' extensive financial commitments and operational integration, the mere existence of termination provisions in the Equilon and Motiva joint ventures did not call into question either venture's legality. Pet. App. 58a-60a. Moreover, the court of appeals did not suggest that the pricing policy for Equilon was likely to affect any activity after a hypothetical unwinding. As a general matter, *all* joint ventures can be unwound. The Department of Justice (DOJ) and the FTC have recognized that the duration of a joint venture may affect the antitrust calculus, and their *Competitor Collaboration Guidelines* correspondingly provide that a joint venture generally cannot be treated as a merger if it has a term of less than ten years. See DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 1.3 (Apr. 2000) (*Competitor Collaboration Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>, discussed at note 11, *infra*. Petitioners' alliance did not terminate by its own terms within ten years and therefore satisfied the relevant durational term for treatment as a merger. See C.A. Appellees' Supp. E.R. 1207, 1257-1258. Of course, if a joint venture unwinds and the venture partners resume separate participation in the market, Section 1 would apply to any subsequent agreements between them.

alter petitioners' status as non-competing participants in a joint venture. The court of appeals did not identify any competition—beyond the assumed but non-existent competition between Shell and Texaco—that the pricing agreement could threaten.[9]

b. The court of appeals' error is strikingly apparent when viewed in the context of Equilon's formation. The formation of a joint venture by competitors may be unlawful per se if it does not involve an efficiency-

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[9] While it is conceivable that a pricing agreement among joint venture participants could affect competition outside the joint venture, neither the court of appeals nor respondents have identified any such anticompetitive activity in this case. For example, if a joint venture is a supplier of inputs to the venture participants, the venture can conceivably facilitate a cartel by artificially inflating the venture participants' input costs. But no one has suggested such a relationship between the joint venture and the venture participants here. And because the two joint venture participants did not have a vertical relationship in the domestic downstream markets—neither sold gasoline or pipeline services to the other—they were not postured to enter into a per se unlawful vertical price fixing agreement. Cf. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). Petitioners did continue to compete outside their joint ventures' spheres. Pet. App. 56a; Shell Pet. 3. Respondents, however, have not argued that the agreement to unify Equilon's prices of Texaco-branded and Shell-branded gasoline affected competition in those other markets. For example, there is no indication that petitioners used the pricing agreement to manipulate the value of the companies' trademarks or to facilitate price fixing in markets where the two companies continued to compete. See *BMI*, 441 U.S. at 23-24 (distinguishing situation in which competing copyright holders "use the blanket license to mask price fixing in such other markets"). Cf. 13 Herbert Hovenkamp, *Antitrust Law* ¶ 2122b, at 132 (2d ed. 2005) (a joint venture may pose a threat to competition if it "eliminat[es] the competition that exists between the joint venture participants outside the venture. This might happen if the joint venture becomes an excuse for price fixing with respect to the venturers' nonventure business").

enhancing integration of economic activity. See, *e.g.*, *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356-357 (1982); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-598 (1951). There is no basis for serious suggestion in this case, however, that the formation of Equilon was itself subject to per se condemnation. The FTC thoroughly reviewed petitioners' alliance,[10] and it is undisputed on this record that Equilon was an efficiency-enhancing venture. Pet. App. 4a-5a, 9a, 50a.

The formation of efficiency-enhancing joint ventures like Equilon is "judged under a rule of reason" because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld*, 467 U.S. at 768. See also 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478a, at 318 (2d ed. 2003) (a "venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Sherman Act § 1"). Furthermore, joint ventures (like Equilon) that involve a high degree of efficiency-enhancing integration, have a substantial duration, and

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[10] See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). Review by federal antitrust regulators does not, of course, prevent further judicial review. The entry of a government consent decree provides powerful evidence of the lawfulness of a merger or joint venture, see *BMI*, 441 U.S. at 13, 16, but it does not place the transaction beyond further judicial examination. See, *e.g.*, *California* v. *American Stores Co.*, 495 U.S. 271 (1990) (California successfully challenged supermarket merger despite FTC's review of the transaction); see also *New York* v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995).

eliminate relevant competition between the venture partners, can appropriately be treated as mergers.[11]

The FTC accordingly evaluated Equilon's formation under the rule of reason as a merger of petitioners' downstream operations in the western United States. See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). The FTC applied the antitrust enforcement standards that the Justice Department and the FTC apply to mergers, and it evaluated the joint venture in essentially the same way that it would have analyzed the complete merger of Shell and Texaco if they had no operations other than downstream operations.

As a result of the ensuing evaluation, the FTC issued a complaint alleging that petitioners' alliance, as originally proposed, would substantially lessen competition in seven distinct markets in which the combined operation would have an excessively high market share.

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[11] Section 1.3 of the *Competitor Collaboration Guidelines*, note 8, *supra*, spells out the conditions under which a competitor collaboration "ordinarily" should be treated as a horizontal merger and analyzed under the agencies' *Horizontal Merger Guidelines*:

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [ordinarily, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3 (footnotes omitted). (The *Horizontal Merger Guidelines* are reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992, rev. Apr. 8, 1997) <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.). See also 13 Hovenkamp, *supra*, ¶ 2121c, at 127-129 (describing when production joint ventures should be treated as mergers); *id.* ¶ 2123d, at 147.

In re Shell Oil Co., 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners consequently entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent such harm, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

The court of appeals in this case did not question the FTC's judgment that petitioners, upon satisfying certain conditions, could create a lawful joint venture, nor did the court hold or suggest that the ultimate formation of Equilon violated the antitrust laws. That formation effectively merged petitioners' operations in the refining and sale of gasoline in the western United States and eliminated all downstream competition between them. Because petitioners lawfully ceased to compete in the relevant markets at the same time that they implemented the challenged agreement respecting the pricing of the joint venture's products, that agreement cannot qualify as a naked restraint among competitors that would warrant per se condemnation.

c. Per se treatment would also be inappropriate even if, contrary to the court of appeals' premise, petitioners' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. At that point, petitioners were not independent participants in the downstream markets and therefore were incapable of forming a horizontal agreement within the contemplation of the antitrust laws—i.e., "an agreement among competitors on the way in which they will compete with one another," *NCAA* v. *Board of Regents*, 468 U.S. 85, 99 (1984)—with respect to operations in those markets. Rather, petitioners would have been acting solely in their capacity as owners of a market-

place participant. See *Maricopa County Med. Soc'y*, 457 U.S. at 356 ("partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit" are "regarded as a single firm competing with other sellers in the market"). The decision at that point should be no more subject to per se condemnation than the decision to market a single brand of Equilon gasoline at a certain price. This Court's decision in *Copperweld*, which makes clear that the independent conduct of a unitary economic actor cannot give rise to Section 1 liability, would preclude any application of Section 1 in that context. See *Copperweld*, 467 U.S. at 771.

d. Because petitioners' lawful formation of the joint venture—and not their alleged pricing agreement—eliminated competition between petitioners, the court of appeals' and respondents' reliance on *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), is misplaced. See Pet. App. 17a-20a; Supp. Br. in Opp. 9 n.8. In *Citizen Publishing*, an Arizona city's only two daily newspapers formed a jointly owned entity to set prices collectively and pool profits, while each newspaper retained its separate corporate identity and continued to produce its own news and editorial content. 394 U.S. at 133-134. The United States challenged the newspapers' agreement, which was intended "to end any business or commercial competition between the two papers." *Id.* at 134. This Court concluded that the arrangement was anticompetitive and that the antitrust violations were "plain beyond peradventure." *Id.* at 135. The Court did not accept the newspapers' contention that a merger or combination of the two newspapers would have been a legitimate, efficiency-enhancing

venture. To the contrary, when the two newspapers subsequently attempted to merge pursuant to an option in the joint operating agreement, the merger was held unlawful under Section 7 of the Clayton Act, 15 U.S.C. 18. See *Citizen Publ'g*, 394 U.S. at 134-135; *United States* v. *Citizen Publ'g Co.*, 280 F. Supp. 978, 983-984, 993, 994 (D. Ariz. 1968).

Here, by contrast, the court of appeals did not question that the formation of the joint venture was lawful. And the challenged agreement to unify the pricing of Equilon's two brands of gasoline did not eliminate any competition that would otherwise have existed. Accordingly, *Citizen Publishing* is simply not on point.[12]

3. In sum, because the challenged agreement to unify prices could not, and did not, itself eliminate competition, there is no basis for subjecting that agreement to per se condemnation. See *BMI*, 441 U.S. at 23 ("[m]ergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard"); *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 961 F.2d 667, 671 (7th Cir.) ("agreements among business rivals to fix prices are unlawful *per se*, although a merger of the same firms, even more effective in eliminating competition among them, might be approved with little ado"), cert. denied, 506 U.S. 954 (1992). Because respondents alleged only a classic "price fixing scheme," and have "disclaimed any reliance

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[12] Furthermore, the decision in *Citizen Publishing* predates this Court's elaboration of the limits of the per se rule. See *NCAA*, 468 U.S. at 100-104; *BMI*, 441 U.S. at 8-10, 19-20. The Court's analysis in *Citizen Publishing* focused on the failing firm defense, not the proper application of the per se rule. See 394 U.S. at 136-139.

on the traditional 'rule of reason' test," Pet. App. 7a, the failure of their per se theory necessitates reversal.[13]

B. The Court Of Appeals Erred By Invoking The Ancillary Restraints Doctrine In This Case

The court of appeals compounded its error by invoking the ancillary restraints doctrine to limit the reach of its mistaken application of per se principles. Having concluded that petitioners' agreement to unify the prices of the joint venture's separately branded products constituted unlawful "price fixing," the court held that petitioners could avoid per se condemnation only by showing that the agreement was "ancillary" to and "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 15a-18a, 21a; see

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[13] The court of appeals noted that respondents also asserted a "quick look" theory, but it declined to reach that theory of liability. Pet. App. 7a, 13a n.7. Quick look analysis, however, is available only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999). Respondents offer nothing beyond the formalistic "price fixing" label to explain why or how petitioners' agreement to unify Equilon's prices, independent of the joint venture agreement itself, could have an "anticompetitive effect on customers and markets." Their quick look theory, therefore, should be dismissed as well. See *Indiana Fed'n of Dentists*, 476 U.S. at 455, 460-461 (1986) (dentists formed "federation" for the "primary purpose" of suppressing competition on a particular service, and factfinder had found "proof of actual detrimental effects" from that practice); *NCAA*, 468 U.S. at 106-108 (the "anticompetitive consequences" of the NCAA's limitation on member schools' ability to televise football games was not only "apparent," but had already been found); *Polygram Holding, Inc.* v. *FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (venturers required to justify their restraint on "price cutting and advertising with respect to products *not part of the joint venture*") (emphasis added). Cf. Supp. Br. in Opp. 4-5.

id. at 22a & n.14, 27a. Respondents' detailed defense of the manner in which the court of appeals applied the doctrine, Supp. Br. in Opp. 3-9, misses the point. The court of appeals did not *mis*apply the ancillary restraints doctrine. Rather, that court erred *by* applying the ancillary restraints doctrine at all.

1. Judge Taft's decision in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899), which recognized that certain consensual restraints may ultimately promote competition, introduced the ancillary restraints doctrine into antitrust law. That doctrine "teaches that some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1395 (9th Cir.) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-798 (1965)), cert. denied, 469 U.S. 990 (1984).[14] Application of the doctrine requires examination of whether a challenged agreement is reasonably designed to further the procompetitive aspects of the joint venture.[15]

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[14] "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.*, 485 U.S. at 729 n.3.

[15] See *Rothery Storage & Van*, 792 F.2d at 227 (restraint was "reasonably necessary"); *Addyston Pipe*, 85 F. at 290-291 (must be "commensurate"); 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1912c at

The purpose of the ancillary restraints doctrine is thus to determine whether an agreement that would otherwise be condemned as a per se invalid restraint of trade should instead be analyzed under the rule of reason as part of an efficiency-enhancing integration of economic activity.[16] The doctrine serves an important role in distinguishing legitimate cooperative activity from sham undertakings designed to disguise "an old-fashioned price fixing cartel." Pet. App. 50a. The federal enforcement agencies, for example, apply the per se rule to agreements "of a type that always or almost always tend to raise price or reduce output," and the Department of Justice may prosecute them criminally, but the agencies apply the rule of reason when "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits." *Competitor Collaboration Guidelines* § 3.2. The court of appeals' hypothetical example of two soft drink companies entering into a joint research venture accompanied by an agreement to fix the price at which each sells its own unrelated products, Pet. App. 16a, illus-

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320 (2d ed. 2005) ("An ancillary restraint is one that is reasonably related to a joint venture or transaction that, at least upon initial examination, promises to increase output, reduce costs, improve product quality, or otherwise benefit consumers.").

[16] See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 689 (1978) (the rule of reason "has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction"). See also *Addamax Corp.* v. *Open Software Found.*, 152 F.3d 48, 51-52 (1st Cir. 1998); *Rothery Storage & Van*, 792 F.2d at 224; *Polk Bros.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985); 11 Hovenkamp, *supra*, ¶ 1908a at 251-252.

trates the type of restraint to which the per se rule is properly applied, notwithstanding any ancillary restraint defense that the soft drink companies might raise. Those companies' agreement to fix the price at which *they* independently sell products outside the scope of the joint research venture has no apparent relationship to the venture, and thus does not qualify for rule of reason analysis.

Since Judge Taft's first articulation in *Addyston Pipe*, 85 F. at 280, courts have invoked the ancillary restraints doctrine in two general circumstances. First, courts have applied the doctrine to restraints on admission to joint ventures, distinguishing between unlawful concerted refusals to deal and agreed-upon rules reasonably related to achieving a legitimate joint venture's efficiency-enhancing purposes. See, *e.g.*, *Sullivan* v. *NFL*, 34 F.3d 1091, 1102-1103 (1st Cir. 1994), ("accept[ing], for purposes of this appeal, that rules controlling who may join a joint venture can be ancillary to a legitimate joint activity and that the NFL's own policy against public ownership constitutes one example of such an ancillary rule"), cert. denied, 513 U.S. 1190 (1995).[17]

Second, courts have required joint venture partners to demonstrate the reasonable necessity of restrictions on their own conduct outside the venture. For example, charge card joint ventures must demonstrate the reasonable necessity of an agreement that members not issue certain competing cards. See *United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), cert. denied, 125 S. Ct. 45 (2004). Lawyers dissolving their

[17] See also *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-1387 (5th Cir. 1980).

partnership must demonstrate the reasonable necessity of agreed-upon territorial restrictions on advertising by the former partners. See *Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). Truck leasing companies agreeing to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competition. See *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984).[18]

2. The court of appeals' invocation of the ancillary restraints doctrine is an aberrant departure from settled law. This case does not involve either of the classic examples of joint venture ancillary restraints—namely, agreements restraining joint venture membership or member conduct *outside* of the joint venture. Nor does it involve any other type of concerted activity that would normally be subject to analysis under the per se rule. Instead, the court below applied the ancillary restraints doctrine to an agreement relating solely to the joint venture's *own* conduct. The government is unaware of any other case in which the ancillary restraints doctrine has been so applied.

Respondents argue otherwise, but the cases that they cite do not support their position. See Supp. Br. in Opp. 6. Contrary to respondents' suggestion, the ancil-

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[18] See also *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077-1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *Polk Bros.*, 776 F.2d at 188-190 (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *Rothery Storage & Van*, 792 F.2d at 223-230 (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business).

lary restraints doctrine played no role in this Court's decision in *BMI*. This Court held *without* regard to that doctrine that the rule of reason, rather than the per se rule, governed the blanket licensing agreements at issue in that case. See 441 U.S. at 18-24. In *Freeman* v. *San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), cert. denied, 540 U.S. 940 (2003), the court emphasized that the joint venture partners whose agreement was condemned as unlawful per se remained competitors and that the challenged agreements restrained competition among them. *Id.* at 1149-1150. And in *National Bancard Corp.* v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986), the court addressed an agreement—respecting the rate at which banks compensated each other for handling credit card transactions—that restrained banks as individual competitors. See *id.* at 602.[19]

Respondents have put forward no basis for invoking the ancillary restraints doctrine. The fundamental fact remains that petitioners, in the course of creating Equilon, have exited from the markets in which Equilon now competes. Petitioners' alleged pricing agreement respecting Shell-branded and Texaco-branded products does not restrain competition because petitioners do not compete with each other or with Equilon in the market

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[19] In *National Bankcard*, the banks formed a joint venture credit card system but continued to compete against each other for the patronage of consumers and merchants. The challenged agreement, by setting a uniform rate for handling each others' credit card transactions, restrained the banks as competitors. The court of appeals determined that the challenged agreement was ancillary because it "represent[ed] one such rule establishing a 'necessary' term, without which the system would not function," 779 F.2d at 602, and therefore applied the rule of reason.

for those products. The agreement is not properly subject to analysis under the per se rule, and there is accordingly no need to justify the agreement as a permissible ancillary restraint.[20]

3. The court of appeals' mistaken invocation of the ancillary restraints doctrine is not merely an academic error, but has serious practical repercussions. The court of appeals' decision suggests that joint venture partners can be required to justify, as reasonably necessary to the achievement of procompetitive ends, every choice they make about what the venture does or how it is done. If so burdened, few, if any, joint ventures could survive the onslaught of antitrust attacks.[21]

The inquiry that the court of appeals envisions is particularly burdensome because the court has extended it to an agreement about the pricing of the joint venture's own products, which is scarcely "collateral" to the

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[20] This distinction explains why Professor Areeda's hypothetical of a joint sales agency among Ford and General Motors (GM), like the court of appeals' soft drink hypothetical (see p. 23, *supra*) does not aid respondents. Cf. Supp. Br. in Opp. 8 n.5. Indeed, Professor Areeda's hypothetical does not even address the ancillary restraints doctrine. Rather, his point was that the *formation* of the Ford-GM sales agency was an obviously unreasonable restraint. Here, by contrast, the FTC reviewed petitioners' alliance, and the court of appeals did not suggest that the alliance's formation itself would violate the antitrust laws.

[21] To be sure, once a joint venture is operational, it acts as a single economic entity and may incur antitrust liability, like any other firm, if it acts to restrain competition in the market. For example, a joint venture does not have carte blanche to enter into bid-rigging agreements with rivals in the market. See also pp. 19-20, *supra* (joint venture's formation itself may be unlawful). But it is a far different matter to hold that the owners of a joint venture become subject to per se liability or an ancillary restraints inquiry merely by entering into agreements respecting joint venture operations—like the challenged agreement here—that do not restrain competition.

joint venture. See *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). Indeed, under the court of appeals' rationale, per se liability could extend to a host of other basic decisions that joint venture partners must make concerning the scope of the venture's operations, any of which could be characterized as an agreement to limit the venture's output or raise its prices.[22]

The court of appeals attempted to justify its presumptive application of the per se rule by suggesting that equalizing prices across brands was not a "rational decision." Pet. App. 23a. But "the antitrust laws are not meant to police bad management," *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield*, 373 F.3d 57, 62 (1st Cir. 2004), and they provide no broad-ranging warrant for courts to regulate the efficiency of joint venture practices in the absence of an unreasonable restraint on competition. The ancillary restraints doctrine simply has no role to play in this case.

C. The Court Of Appeals' Result Is Inconsistent With The Procompetitive Purposes Of The Antitrust Laws

The court of appeals' improper expansion of per se liability to encompass agreements that are not "mani-

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[22] The courts have ample authority to examine restraints relating to the actions of joint venture owners outside of the venture. For example, the D.C. Circuit recently affirmed an FTC administrative order in *Polygram*, *supra*, condemning such a restraint without recourse to the per se rule. 416 F.3d at 31. Unlike here, that court squarely relied on the fact that the parties to a joint venture had imposed price and advertising restraints on "products that were not part of the joint undertaking" and that the venturers had continued to sell independently and in competition with their joint venture. *Id.* at 38.

festly anticompetitive," *GTE Sylvania*, 433 U.S. at 49-50, threatens to chill legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control. The court of appeals' erroneous approach also could undercut the per se rule's value in facilitating effective enforcement of the antitrust laws. Per se rules establish bright-line tests that identify consistently pernicious conduct, thereby deterring unlawful behavior and providing clear guidance to businessmen and antitrust counselors. The court of appeals' decision both blurs the bright line and sweeps too broadly, thereby casting a shadow over decisions of numerous businesses and interfering with efficient antitrust enforcement.

Given the potentially serious consequences that attach to per se violations—including criminal and civil enforcement—private economic actors are entitled to know in advance what is per se unlawful and what is not. Production joint ventures, such as Equilon, are increasingly common and often have substantial procompetitive potential. See *Competitor Collaboration Guidelines* Preamble; *id.* § 2.1; 13 Hovenkamp, *supra*, ¶ 2121, at 125-127. The prospect of per se condemnation—and the accompanying risk of treble-damages liability—for conduct that may be integral to the operation of such a venture, such as pricing the products it sells, would no doubt chill procompetitive conduct.[23]

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[23] See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment").

The Department of Justice itself has a particularly strong governmental interest in maintaining a sharp demarcation between conduct subject to the per se rule and that subject to the rule of reason. Effective criminal prosecution of hardcore cartel conduct—such as horizontal price fixing, bid rigging, and market allocation—would be immensely more difficult if defendants were permitted to complicate jury trials with extended arguments about the reasonableness of such practices.

Courts, agencies, and the business community likewise need to have confidence that the per se rule is applied only to conduct that is always—or virtually always—anticompetitive. Otherwise, courts may be understandably reluctant to apply the per se rule. Because the court of appeals' decision extends the per se rule to conduct that not only lacks "predictable and pernicious anticompetitive effect," but may even have substantial "potential for procompetitive benefit," *State Oil*, 522 U.S. at 10, it has the potential to erode the rationale for per se treatment.

CONCLUSION

The judgment of the court of appeals should be reversed.

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SEPTEMBER 2005